No. 6867

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE JOHN K. AND CATHERINE S. MULLEN BENEVOLENT CORPORATION, a corporation,

Plaintiff and Respondent,

vs.

THE UNITED STATES OF AMERICA,

Defendant and Appellant,

THE J. K. MULLEN INVESTMENT COMPANY, a corporation,

Plaintiff and Respondent,

vs.

THE UNITED STATES OF AMERICA,

Defendant and Appellant.

APPELLANT'S BRIEF

Upon Appeal from the United States District Court for the District of Idaho, Eastern Division

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....., Clerk

TABLE OF STATUTES

Pages of Brief

Federal Statutes:

Idaho Compiled Statutes (1919)

TABLE OF CASES

TABLE OF CASES---(Continued)

TABLE OF CASES---(Continued)

TABLE OF CASES---(Continued)

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STATEMENT OF FACTS

The two actions consolidated at the trial as well as for the purpose of this brief are brought under the provisions of the Tucker Act by the claimants of municipal improvement district bonds, to recover of the United States upon an implied contract the unpaid balance of the principal and interest upon those bonds.

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*—Page references are to transcript in Benevolent Corporation case, unless otherwise specified.

Case No. 731, which shall hereinafter for the sake of brevity be identified as the Benevolent Corporation case, involves bonds of improvement districts 1, 2, and 8 of American Falls, Idaho, all of the lots of which districts have been acquired by the United States for reservoir site purposes under the provisions of the act of Congress of June 17, 1902.

Case No. 743, which shall hereinafter, also for convenience sake, be referred to as the Investment Company case, involves bonds of improvement district No. 9, approximately 28 per cent of the lots of which were acquired by the United States and inundated as a part of the site of the American Falls Reservoir on Snake River (Pl. Ex. 13; Pl. Ex. 1 in case 743, pages 143, 144).

These improvement districts were created pursuant to Article 6, Title 32, Chapter 163 and Chapter 171, Idaho Compiled Statutes, in 1915 and 1916; numbers 1 and 2 for the construction of sewers and numbers 8 and 9 for sidewalks (Pl. Ex. 4-6, page 142 in case 731; Pl. Ex. 7 in the case). The improvements were made and the cost apportioned among the several lots in accordance with their respective benefits, and assessments were levied to conform to such apportionment. The assessments were made and levied immediately after the creation of the improvement districts, and bonds were issued and sold for improvement district number one in 1915 and for the other districts in 1916. (Page 142, Pl. Ex. 4-6; Pl. Ex. 7 in case 743).

The assessments, made for the payment of the costs of said improvements, were amortized as to principal and interest over a period of ten years ending coincident with the maturity of the said bonds (pages 141-3, Pl. Ex. 1-3, 13; Pl. Ex. 4 in case 743). These assessments upon the several lots later acquired by the United States for reservoir site purposes were paid in full (page 74, finding 22; 743 page 59, finding 16). Some of the lot owners within the several improvement districts paid the full assessment against their lots in advance as they were privileged to do under the provisions of Section 4019, Idaho Compiled Statutes (Pl. Ex. 13, page 130). Others permitted these assessments against their lots to become delinquent so that when the lots were purchased by the United States for purposes aforesaid, all delinquent as well as current and future assessments, together with penalties upon delinquencies, were paid, either by the owner, or the same withheld from the purchase price to the owner and paid by the United States to the city of American Falls whose duty it was to make collection of such assessments, safely keep, and pay over to the holders of bonds of the respective improvement districts. (Pages 109, 134; pg. 143, Pl. Ex. 13).

The United States commenced purchasing lots in said improvement districts for reservoir right of way purposes in 1920, and continued in that program through the following years and ending in 1926 (pages 131, 134, 135). In all purchase transactions with the individual lot owners all of the unpaid improvement district assess-

ments were paid to the city of American Falls those assessments not yet accruing being paid in advance, which involved the payment of interest as amortized in said assessments before the same had been earned (page 74 finding 22; pp. 130, 143 Pl. Ex. 13) (Case 743 p. 59 finding 16; pp. 114, 128, Pl. Ex. 13).

During said period of 1920 to 1926 the United States also acquired some of the lots in said improvement districts by lawsuits in exercise of the powers of eminent domain (pp. 131 and 134). In these actions the city of American Falls, Idaho, was made a party defendant, process regularly served thereupon and the value of the lots involved paid into court by the United States in pursuant of the judgment of the Court (cases 311-316 and 318-324, U. S. Dist. Court of Idaho, Eastern Div.).

During said period of 1920 to 1926 the United States also acquired some of the lots within said improvement district from Power County, Idaho, a municipal corporation in which said city of American Falls is situated, through tax title held by said County for failure of payment of State and County taxes upon the same (p. 143, Pl. Ex. 8). In that the purchase of lots in the improvement districts resulted in the payment of all assessments against the several lots together with penalties and interest upon delinquencies, the action of the United States complained of was beneficial rather than detrimental to the bondholders (page 113). The default upon payment of principal and interest upon bonds of district No. 9, which was only partially acquired and inundated as a

part of the American Falls reservoir site (approximately 28 per cent of the lots of the district) was much greater than the default in such payments upon bonds of districts Nos. 1, 2, and 8 which were acquired by the United States in toto (page 143, schedule D, Pl. Ex. 9; page 113).

In numerous sale and purchase transactions with the government the vendors were permitted to remove the buildings and other improvements upon the respective lots and move them outside of the reservoir site, which was done (page 123; Pl. Ex. 1, page 144); the work of tearing down and moving buildings from the reservoir site commencing in 1920 or 1921 and continuing through and including the year 1925.

When the United States commenced acquiring said lots for right of way purposes and until 1923, there was no question raised as to the sufficiency of the improvement district assessments levied against the several lots to retire the bonds with interest (page 134). In February 1923, a bank, in which such assessments paid were kept on deposit by the city of American Falls, failed (page 112) and its suspension precipitated an audit of the several improvement district funds by the city of American Falls (p. 143, Pl. Ex. 8), which disclosed the funds collected and those yet collectible were short some $20,000 in meeting the payment of bonds outstanding (p. 143 Pl. Ex. 8). The several items of the shortage are summarized in the report of the Auditor (Plaintiff's Exhibit 8).

Owing to threats of reassessment pursuant to section 4141, Idaho Compiled Statutes, to cover this shortage, the officers of the United States in charge of acquiring said reservoir right of way, in all right of way purchase transactions in 1925 and following, as a precaution, suspended payment of a part of the purchase price in an arbitrary amount pending the receipt of an opinion as to whether or not a proposed reassessment against the respective lots would constitute liens which the vendor was required to pay, when said arbitrary amounts so withheld were paid by the United States to the vendors in said right of way purchase transactions (pp. 134-5, 136-7).

Title to all of the lots within the improvement districts required for reservoir right of way purposes was acquired by the United States between 1920 and 1926 (page 131), and the officers of the United States in charge of the construction of said American Falls Reservoir have, ever since such acquisition, claimed fee simple absolute title in the United States and have never recognized any interest in said property of the plaintiffs in these actions.

The city of American Falls in 1928, by ordinance, purported to levy reassessments against the several lots within said improvement districts, pursuant to section 4141, Idaho Compiled Statutes, title to which lots had been acquired by the United States (page 119; page 144, Pl. Ex. 16).

Suit was commenced by the Benevolent Corporation in November 1929, and by the Investment Company in July, 1930 (page 7) (743, page 7).

The plaintiffs concede and the trial court found, that the original assessment has been paid in full (finding 22, page 74) (Finding 16, page 59 in case 743) and that the purported reassessment is void as against the United States. The findings of fact and conclusions of law and the judgment are based upon the theory that the original assessments, having proven insufficient to pay the bonds in full in principal and interest, the city of American Falls, as representing the bondholders, has a right to levy a reassessment pursuant to said Idaho state statute, in order to make up said deficits; that the action of the United States in acquiring title to the lots in said improvement districts, thus making the same tax exempt, has prevented the city from bringing into operation the Idaho state statute providing for a reassessment when through inadvertence the original assessment is insufficient to meet the cost of the improvement (Section 4141, Idaho Compiled Statutes). The Court concluded as a matter of law that such action on the part of officers of the United States has implied a contract on the part of the United States to pay the amount remaining unpaid upon outstanding improvement district bonds and that although the implied contract is based upon the acqusition of title in the United States (between 1920 and 1926), the causes of action did not accrue until the alleged tortious actions on the part of the officers of the United States in flooding the lots in said improvement districts in 1927 (conclusion 3, page 77).

Demurrers to the complaints were overruled as well as motions to strike out and make more definite and certain (page 43; 734, page 34).

At the trial, ownership of the bonds in the plaintiffs as a basis for their respective actions was shown upon hearsay testimony only (pp. 82-98). When plaintiffs and respondent were claimed to have acquired the bonds, in question, was not shown.

CHRONOLOGY

	Mullen Benevolent Corporation v. United States Case No. 731						Mullen Inv. Co. v. U. S. Case No. 743	
	Local Impr. Dist. No. 1		Local Impr. Dist. No. 2		Local Impr. Dist. No. 8		Local Impr. Dist. No. 9	
	Date	Ref *	Date	Ref *	Date	Ref *	Date	Ref **
Creation of district	1915 (Mar)	60	1916 (June)	63	1916 (June)	66	1916 (June)	50
Levy of assessments	1915 (July)	61	1916 (Aug)	64	1916 (Sept)	67	1916 (Sept)	51
Payment of entire assessments upon some lots	1915	130	1916	130	1916	130	1916	114
Issue and sale of bonds	1915 (July)	62	1916 (Dec)	65	1916 (Dec)	69	1916 (Sept)	52
Purchase by U. S. of first property in res. site	1920	134	1920	134	1920	134	1920	118
Condemnation by U. S. of property in res. site	1921	131	1921	131	1921	131	1921	115
Purchase by U. S. of property in reservoir site and payment of all district assessments by the vendor or the United States	1920-1926	74 109	1920-1926	74 109	1920-1926	74 109	1920-1926	59 94
Removal of buildings on all lots within the reservoir site	1920-1926	123	1920-1926	123	1920-1926	123	1920-1926	108
Failure of First National Bank of American Falls, with funds of dist. on deposit	1923 (Feb)	112	1923 (Feb)	112	1923 (Feb)	112	1923 (Feb)	97
Maturity of bonds	1925 (July)	62	1926 (Aug)	65	1926 (Sept)	68	1926 (Sept)	52
Organization of plaintiff corporation	1925					59	not shown	
Flooding of parts of districts by partial filling of reservoir	1925-1926	131	1925-1926	131	1925-1926	131	1925-1926	115
Filling of reservoir to capacity	1927	131	1927	131	1927	131	1927	115
Enactment by City of ordinances purporting to reassess all lots to make up balance due upon bonds, including lots in which title had passed to U. S. by deed, condemnation decree and deed by holders of tax deed	1928	69	1928	69	1928	69	1928	109
Suit commenced	1929 (Nov)	73	1929 (Nov)	73	1929 (Nov)	73	1930 (July)	7

*Reference to page of transcript, Case No. 731. **Reference to page of transcript, Case No. 743.

The Benevolent Corporation was not organized until 1925 (page 96).

The defendants moved for non-suit upon the grounds as specified and the motion was overruled (pp. 130, 139; case 743 pages 122, 123). The cases were decided for the plaintiffs. Findings of Fact and Conclusions of Law were made by the Court (pp. 59-78; 743, pp. 48-63); moved to be corrected by the defendant (p. 149; 743 page 133); the motion overruled and judgment entered upon the facts thus found, giving judgment in favor of the Benevolent Corporation for $8,104.79 and costs (page 78) and in favor of the Investment Company for $388.48 and costs (743, page 63), both as against the United States.

Exceptions were taken to the rulings of the Court as required, a bill of exceptions has been certified to the Court (p. 145; 743, page 129), and an appeal has been taken to this court assigning error in the rulings of the trial court (pp. 159-189; case 743, pp. 141-167) grouped, for sake of convenience, in argument as hereinafter set out.

ANALYSIS OF PLEADINGS

The complaints as amended allege the creation of the several improvement districts (paragraphs 5, 9, 13 of pp. 13, 20, 23, respectively; and par. 5, page 12 in case 743), the levy of assessments against the lots of said districts for payment of the cost of the improvement, with interest

over a period of ten years (pars. 5, 9, 13, pages 13, 20, and 23, respectively; par. 5, page 12 in 743), the issuance of bonds of the several districts as per sample set out (pars. 6, 10, 14, pp. 15, 22, 25, respectively; par. 6, page 14 in case 743), and the purchase of a part thereof (Pl. Ex. 1-4, pages 141-2) by one J. K. Mullen and a transfer "thereafter" to the plaintiffs (pars. 7, 11, 15 pgs. 16, 22, and 25, respectively). It is then alleged that through mistake and inadvertence of the city officers in making the original levy of assessments, the same were not sufficient to pay the bonds and interest (par. 17, page 26-27), that on or about January 1, 1927 the United States under authority of law and acting through the authorized agents of the Bureau of Reclamation, Department of the Interior, without proceeding in eminent domain against the plaintiffs and aware of the outstanding unpaid bonds and the insufficiency of the original assessments to pay the same, took exclusive possession, title and control of the lots of the several improvement districts (except district No. 9, and in that district approximately 28% of the lots thereof) for a public purpose, as site for the American Falls Reservoir (par. 19, pages 28-29) and sold, destroyed or removed the improvements on said lots and inundated the lots and deprived the plaintiffs of their property and the one and only method of enforcing payment of the bonds and the reassessment later made (par. 19, page 29); that on July 3, 1928, while the bonds were owned and held by the plaintiff and were due, owing and unpaid because of the mistake or inadvertence in the fail-

ure in making the original levy, to levy a sufficient amount therefor, and to comply with its statutory duty the city of American Falls enacted its ordinances 122, 123, 124 (Pl. Ex. 16, page 144) providing for a reassessment upon all taxable property in the districts and directing the making and filing of a reassessment roll of the taxable property within the districts and reassessing the cost of the benefits against the taxable property of the districts (par. 17, pages 26-27); that reassessment rolls were duly certified and filed and notice thereof given according to law (par. 17, page 27); that the property so taken by the United States was at the time of taking and destruction of value greatly exceeding the claim of plaintiffs (par. 19, pages 29-30) and that the United States is indebted to the plaintiffs the balance unpaid upon said bonds with interest (par. 20, page 30). The defendants demurred (page 31) to the Complaints as amended, moved to strike therefrom, and to make more definite and certain (pages 38 and 41-43), and upon denial by the Court (page 43) answered, making the general issue and alleging five additional separate defenses:

(1) The payment of the original assessment levied against the lots of the several districts and their loss by reason of acts of the city (page 51);

(2) Lack of jurisdiction by reason of no contract, express or implied. The United States when acquiring the lots of the several districts took the same under claim of

title in the United States and has not recognized the plaintiffs as the owners thereof or having any interest therein (p. 54);

(3) There was no implied contract on the part of the United States because the action of the United States in acquiring title to the lots in the several districts was beneficial to the bondholders; if any injury was suffered by the plaintiffs the same was too remote and consequential to make the taking an implied contract (page 55);

(4) That the plaintiff had acquired the bonds after any injury thereto may have occurred by action of the United States in acquiring the lots of the several districts for reservoir right of way purposes (pp. 56-57);

(5) That the plaintiffs' actions are barred by the Idaho statute of limitations (p. 57).

BRIEF AND ARGUMENT

We shall preliminarily discuss jurisdiction of the court to hear these cases and then follow with a discussion of the theory of the plaintiff and its relation to the evidence and then discuss other assignments of error.

The lack of jurisdiction in the trial court to hear and determine the purported action against the United States appears from the complaints and is not supplied by the proof. Absence of jurisdiction is assigned in assignments of error 1 (a) to 1 (e), inclusive, 2, 11, 25 and 26. (Pages 159-161; 164, 187-189).

It is the duty of the court *sua sponte* to dismiss where the record shows lack of jurisdiction or fails affirmatively to show jurisdiction. *Northern Pacific Steamship Company v. Soley,* 257 U. S. 216; *Morris v. Gilmer,* 129 U. S. 315, and authorities cited.

The United States can be sued for such causes and in such courts only as they have, by act of Congress, permitted. *United States v. Gleeson,* 124 U. S. 255.

The permissive act here involved is the Tucker Act (Act of March 3, 1887; United States Code, Title 28, Paragraph 41, Subdivision 20), and the court has no jurisdiction as against the United States beyond the grant and limitations of this act.

Suits against the United States for compensation for taking of private property, as here alleged, are not founded upon the Constitution, but are based on an implied contract to pay just compensation for the property taken, and the jurisdiction of the court to entertain such suits derives from that clause of the Tucker Act conferring jurisdiction, concurrent with the Court of Claims, of all claims not exceeding ten thousand dollars, founded "upon any contract, express or implied, with the government of the United States." Unless there is such contract, the court is without jurisdiction to entertain the suit *Hurley v. Kincaid,* 285 U. S. 95; *United States v. Lynah,* 188 U. S. 445; *United States v. Cress,* 243 U. S. 316; *United States v. Minnesota Mutual Investment Company,* 271 U. S. 212; *United States v. North American Transport & Trading Company,* 253 U. S. 330, 335.

In order to give rise to such implied contract, there must be a direct and actual taking of the property of plaintiff for the use or purposes of the United States, with intent and authority to take, and under circumstances from which an intent to pay for the property so taken may be inferred in fact.

None of these conditions are met in the instant cases, and hence no contract can be implied, upon which jurisdiction may be predicated.

The Tucker Act under the provisions of which these actions are brought is a grant of right which is wholly measured by the terms of the act. The provisions thereof which limit the actions to those upon contract, express or implied and impose a time limit of 6 years in which the right may be enjoyed, are not statutes of limitation, in the ordinary understanding of the word, but are the very genesis of the right, fixing the limit of operation both in subject matter and point of time.

Chaps 2 and 7, Title 28, U. S. C.

Champagnie Generale Tr. v. U. S., 52 Fed. (2) 1053 and U. S. Supreme Court cases therein cited.

Finn v. U. S., 123 U. S. 227.

Carpenter v. U. S., 56 Fed. (2) 828.

The six-year limitation of the Tucker Act is jurisdictional; *Phillips v. Grand Trunk,* 236 U. S. 662, 666; *Finn v. United States*, 123 U. S. 227; *United States v. Wardwell,* 172 *U. S.*, 48, 52; *Kendall v. United States*, 14 C.

Cls. 122; *Baltimore & Ohio Railway v. United States,* 34 C. Cls. 484, 508. Plaintiff's right of action, if any, arose at the time the United States acquired the lands in question by purchase or condemnation. If plaintiffs lost any right it was when the United States acquired the property. The flooding of the land did not affect plaintiffs' rights in the slightest after their acquisition by the United States.

The record in the cases at bar is undisputed, that the government acquired some of the lots in the several improvement districts as early as 1920, and a large part of the lots by purchase and condemnation between 1920 and 1923 (Testimony of Mr. Banks, pp. 131, 134-135). If we assume that there existed an implied contract as the judgment of the lower court holds, the plaintiffs are required to show that the right to sue upon the contract accrued within six years of the bringing of the action or that the United States acquired all of the lots within the improvement districts within six years of the commencement of their actions. (November, 1929 and July 1930). The pleadings and proof wholly fail to show this fact, indispensable to the jurisdiction of the trial court.

Any obligation of the United States in these cases is, necessarily, upon claim of an implied contract. Implied contracts in fact do not arise from the denials and contentions of parties but from their common understanding in the ordinary course of business whereby mutual intent to contract without formal words therefor is shown.

Tempel v. U. S., 248 U. S. 121;

Hill v. U. S., 149 U. S. 593;
Knapp v. U. S., (1911) 46 Ct. Cl. 601;
B. & O. Ry. Co. v. U. S., 261 U. S. 592-599.

The lots in the several improvement districts were acquired by the United States by purchase and by suits in exercise of the power of eminent domain.

The United States did not take plaintiffs' bonds, nor take for its use any right which plaintiffs may have had under these bonds.

The cases are closely analagous to that of *Omnia Company v. United States,* 261 U. S., 502. In that case plaintiff had a contract with the Alleghany Steel Company, under which the latter undertook to furnish plaintiff with a large quantity of steel plates. Thereafter, the United States requisitioned the entire product of the Steel Company's plants, and thereby rendered impossible the performance, by the Steel Company, of its contract with plaintiff. Plaintiff brought suit under the Tucket Act for a "taking" by the United States of its contract with the Steel Company. The court held, however, that while a contract was property, which, when taken for public use, must be paid for by the government, that there was no taking by the government of plaintiffs' contract; that the United States acquired no right under the contract, and that plaintiff was merely "frustrated" by the government of the United States in enforcing its contract against the Steel Company, and that such action did not give rise to a cause of action against the United States.

The court states: "Plainly, here there was no acquisition of the obligation or the right to enforce it," and, further, "As a result of this lawful governmental action, the performance of the contract was rendered impossible. It was not appropriated but ended."

So here, the United States did not take plaintiffs' bonds or did not acquire any right under them. The United States "took" only the land which they acquired by lawful purchase or condemnation. If plaintiff lost anything, it was merely a contingent and conditional right of reassessment or further assessment, which might have existed in favor of plaintiffs if the land had remained in private hands. The government, however, did not take this right. It was merely "ended", as stated by the Supreme Court, as an incidental result of the government's acquisition of the lands.

The officers in charge of the acquisition of the property as a site for the American Falls reservoir took title thereto in the name of the United States and have ever since claimed ownership and title exclusive of any interest claimed by the plaintiffs and without recognition of their claim.

The plaintiffs complaint fails to supply the necessary jurisdictional allegation that the government officers recognized their claim of right. The proof is undisputed.

Witness Banks (construction engineer in charge of construction of American Falls Dam for the United States) testified:

"At the time of taking possession of those lots as engineer in charge of construction, I claimed title to said property as the title of the United States prior to the time it was flooded, and did not recognize the bondholders of special improvement district bonds as the owners of said lots or of any interest therein.

I have never stated that the United States withheld from the purchase price due to lot owners any money for payment of bonds, nor have any of my subordinates been authorized to make any such statement, or made any such in my presence. There was no money withheld from the purchase price due vendors or lot owners for the payment of any bonds. On some of the lot purchase transactions a sum of money was withheld from said lot vendors, temporarily, pending my receipt of a legal opinion as to whether or not a proposed reassessment against lots within said improvement districts would constitute such a valid lien which our land purchase contracts authorized us to pay and deduct from the purchase price. The money temporarily suspended was paid to the land owners." Tr. 132.

It is true the Court found (finding 23) that

"the officials of the United States in charge of the property took the same as the property of the private individuals and at the time of taking recognized the rights of the plaintiff * * * * *". (Page 75).

but the foregoing testimony negatives any such finding which has no support in the testimony of any of the witnesses who testified at the trial.

In the case of *Tempel v. United States, supra,* the United States Supreme Court held:

> "The fiindings of fact made by the trial court (amplified by the reports of the Secretary of War, of which we take judicial notice,) show that the government claimed at the time of the alleged taking, and now claims, that it already possessed, when it made its excavation in 1909, the property right actually in question. It is unnecessary to determine whether this claim of the government is well founded. The mere fact that the government then claimed and now claims title in itself, and that it denies title in the plaintiff, prevents the court from assuming jurisdiction of the controversy. The law cannot imply a promise by the government to pay for a right over, or interest in, land, which right or interest the government claimed and claims it possessed before it utilized the same. If the government's claim is unfounded, a property right of plaintiff was violated; but the cause of action therefor, if any, is one sounding in tort; and for such, the Tucker Act affords no remedy. *Hill v. United States* 149 U. S. 593, which, both in its pleadings and its facts, bears a strong resemblance to the case at bar, is conclusive on this point. See also *Schillinger v. United States,* 155 U. S. 163. The case at bar is entirely unlike both the

Lynah case and the Cress case. In neither of those cases does it appear that, at the time of taking, there was any claim by the government of a right to invade the property in question without the payment of compensation."

248 U. S. 121, at page 130.

See also:

U. S. v. Minnesota Mut. Invest. Co., 271 U. S. 212-218;

B. & O. Railroad Co. v. U. S., 261 U. S. 385.

At the trial, the plaintiffs disclaimed any right to have the city reassess lots of the several improvement districts, since title was in the United States at the time the purported reassessment was made. The reassessment in 1928, after the United States had acquired title to all of the lots within the improvement districts, was set up to show that the plaintiffs attempted to avail themselves of every remedy, but are without a remedy, and their security has been rendered valueless by reason of certain acts on the part of the officers of the government (see findings 18, 19, 20, 22, 23, 24 at pages 70, 71, 72, 74 and 75). The action complained of is the acquisition of the lots in the several improvement districts, in the name of the United States, taking them outside of the power of local taxation including the power to reassess the lots as the local statutes under some circumstances permit and that a contract to pay the bonds is thus implied.

The action of the officers of the United States in placing property beyond the local taxing power, in pursuance of an admittedly proper governmental function does not imply a contract on the part of the United States to pay any tax which otherwise may have been levied upon that property. If any injury resulted to the plaintiff the same is too remote and consequential.

Alabama v. U. S., 282 U. S., 502-507;
Sanquinetti v. U. S., 264 U. S., 146-150;
Bedford v. U. S., 192 U. S., 217, 224;
Keokuck etc. Bridge Co. v. U. S., 260 U. S., 125, 127;
John Horstmann Co. v. U. S., 257 U. S., 138.

That the government is not liable for incidental or consequential damage resulting from governmental action, see also *Willink v. United States,* 240 U. S. 572; *Gibson v. United States,* 166 U. S. 269; *Scranton v. Wheeler,* 179 U. S. 141; *Jackson v. United States,* 230 U. S. 1; *Mitchell v. United States,* 267 U. S. 341; *Bothwell v. United States,* 254 U. S. 231.

It was Alabama's claim, in the case above cited, that by the sale of power generated at Muscle Shoals the United States, by implication, agreed to pay a tax which might have been levied if the power plant had been privately owned. The Supreme Court held the claim was not recognized under the Tucker Act, and the court therefore without jurisdiction.

> "The contract to be recovered upon under Sec. 145, Judicial Code, must be an actual one, and, if implied,

must be implied in fact, not merely implied by fiction, or as it is said, by law. *Baltimore & Ohio R. Co., v. United States*, 261 U. S. 592, 597, * * * Levying a tax does not create a contract. It is a unilateral act of superior power, not depending for its effect upon concurrence of the party taxed." 282 U. S. 502.

Consistency would require the court to recognize an identical claim of any general bondholder or warrant holder of the City or County or any municipality in which the reservoir site was situated, or of the taxpayers therein who might readily complain that the placing of so large a body of land, as the reservoir site, beyond the power of taxation lessened the security of the bond and warrant holders and increased the burden of the owner of taxable property within the municipality.

But the testimony does not bear out any claim of injury by action of the United States but rather that the action of the United States, in purchasing the lots of the several improvement districts, resulted beneficially to the bondholders in the payment of delinquent assessments which otherwise would have been lost to the bondholders.

All of improvement districts 1, 2 and 8 (Benevolent Corporation case) were acquired by the government. But 28 per cent of the lots in improvement district 9 (Mullen Investment Company case) were acquired by the United States P. 1 Ex. 13).

There is a glaring inequality in the plaintiffs claim of

tion of the bonds would have been paid if the United States had not purchased the property. To the contrary, it has been shown that there was a larger proportion of the bonds defaulted in the improvement district where the United States acquired only a small proportion of the lots and nearly all the lots remained in private ownership than in any of the districts where the United States acquired all the lots. The action of the United States was on the whole beneficial to the bond holders and resulted in the payment of a larger proportion of the bonds than would have been paid if the United States had not purchased the property. The reason why this is true is explained by the plaintiffs accountant, Mr. Bowen, as follows:

> "A substantially greater portion of bonds in District No. 9 (case No. 743) remain outstanding and unpaid than in any of the other districts, and in that district a substantial part of the original assessment has never been paid upon lots outside the reservoir site, which is not true in those districts (Nos. 1, 2, and 8) where the United States purchased all of the lots." (Page 113).
>
> "Many of the lot owners, prior to the time the United States purchased the property, allowed their taxes to become delinquent until the United States purchased, when they paid up not only their assessments but in addition the penalties and interest on delinquent taxes, which accounts for this excess collection." (p. 109) (Pl. Ex. 9, page 143).

It is plain that if the bondholders suffered any disadvantage on account of the fact that the property purchased by the United States could not be reassessed after the United States had acquired title thereto, it was a disadvantage which was more than offset by advantages of other kinds, so that the net result was favorable to the bondholders as above set out.

The original assessment, in many cases with penalties and interest added, was paid in full on the property purchased by the United States, but many of the lots outside of the reservoir site which were not purchased by the United States were allowed to go to tax sale and the original assessment was never paid, with the result that we find the largest default in bond payments where the United States did not purchase the property, and the smallest proportion default in bond payment where all the property was purchased by the United States.

The flooding of the lots upon completion of the reservoir in 1926 and 1927, if actionable at all, is in tort, for the recovery on account of which the Tucker Act gives no right of suit against the United States. Such action (the flooding of the property) on the part of the United States did not prevent the operation of the state law permitting reassessments.

The United States paid in full, all taxes and assessments which had been levied on the property at the time the United States acquired it, and is not liable for any taxes and assessments which were not levied at such time.

The action complained of is the taking of the property, which occurred when deed was delivered to United States or summons in condemnation issued.

Heine v. Commissioners, 86 U. S. 655;
Lyon v. Alley, 130 U. S. 177;
U. S. v. City of Buffalo, 54 Fed. (2) 471;
U. S. v. Pierce County, 193 Fed. 529;
Bannon v. Burnes, 39 Fed. 892;
Wulzen v. Board of Supervisors, 35 Pac. 353 (Cal);
Providence R. R. Co., Petitioner, 17 R. I., 324;
Lewis on Eminent Domain, 3rd Ed. Par. 443;
Weiser Valley L. & W. Co. v. Ryan, 190 Fed. 417;
Brown v. U. S., 263 U. S. 78.

The principle involved in the foregoing cases is stated in the opinion in United States v. Pierce Co., as follows:

> "In case, however, the tax was imposed after the acquisition of the property by the United States, it is wholly null and void. I think it was so imposed. Consideration of numerous sections of the taxation law of the State of Washington and of the general scheme embodied in those sections makes it plain that March 1st is fixed as the arbitrary date for the beginning of the taxation year. At that time the assessor and his deputies begin their task of valuing all the property in the county, fixing the valuation as of that date. The actual valuation necessarily consumes the work of a number of men for several months. On completion of the assessment it is sub-

mitted to the board of equalization, which meets in August, and it is subject to entire revision by that body. Still later the corporate authorities of the several cities, towns, and school districts determine upon the amount of revenue needed for their respective purposes, and in October the board of county commissioners, and the other authorities on whom the statute has conferred the taxing power, levy the tax. While I entertain no doubt that it is within the power of the state to treat the entire taxation proceeding as having been taken at some definite date, so far as concerns the general mass of property (as held by the Supreme Court of Minnesota in *State v. Northwestern Tel. Exchange Co.*, 80 Minn. 17, 82 N. W. 1090), a different rule must apply to property which, while the taxation proceeding is still incomplete, passes under the dominion and exclusive jurisdiction of the United States. The transfer of title to the United States operates to withdraw the property from all the effects of subsequent state action and subjects it to the sole jurisdiction of the United States. As to such property all incomplete state proceedings must fall. To hold otherwise would be to hold that boards of equalization, boards of county commissioners, and city councils can meet and deliberate as to the valuation for taxation purposes of property over which the government of the United States is vested with the power of exercising 'exclusive legislation in all cases whatsoever,' and

can by their votes and proceedings determine how large or how small a tax such property shall be required to pay. It is too plain for argument that, without an order levying the tax and fixing its rate, no tax could be enforced; and it is equally plain in this case that such order was made several months after the United States acquired this property. That order could not operate against property that had passed under the exclusive jurisdiction of the United States. As to such property no tax has been levied."

193 Fed. 529 at page 532.

This case was followed by the Circuit Court of Appeals, 2nd Circuit, in the very recent case of *United States v. City of Buffalo, (supra)*.

Upon cross-examination Mr. F. A. Banks, government engineer in charge of construction of American Falls Dam, testified as follows:

"CROSS EXAMINATION

BY MR. BISSELL:

Q. Mr. Banks, you were the gentleman in whose name all of these contracts were purchased and taken, were you not?

A. Most of them, yes.

Q. And you began to make those contracts for the purchase of property down there as early as 1920, did you not?

A. Yes, sir.

Q. And there were a large number of those contracts executed in 1920?

A. Yes, I think so."

The assessments against the lots for the cost of improvements and payment of the bonds were paid in full (Testimony of Mr. Bowen, page 109; Finding 22, page 74). The sole interest in the lots claimed by the bondholders was the right to have the lots re-assessed. This right was alleged to have been destroyed by the United States in taking the lots for a governmental purpose, thus rendering them immune from future tax levies, including the reassessments made by the city in 1928. The flooding of the lots did not make them tax exempt. The plaintiffs' cause of action, if any, accrued when the United States acquired title to the several lots in exercise of eminent domain either by purchase or suit, for it was the conveyance of the lots to the United States and not the subsequent flooding thereof that removed the property from the taxing power and destroyed the remedy of reassessment. It is the destruction of the remedy of reassessment which is the basis of this action.

The trial court used the action of the officers of the United States in taking title to the lots in the name of the government as a basis for the purported implied contract and the alleged tortious action of flooding the lots as fixing the time of accrual of the action. If the lots after purchase by the United States had never been

flooded, the effect so far as the power of reassessment is concerned would have been the same. The flooding did not affect in any way the payment of the bonds.

Suits against the United States under the provisions of the Tucker Act do not admit of any greater right than a claimant has against an individual. The judgment of the trial court under the pleadings and proof herein would enlarge the jurisdiction of Court of Claims to comprehend actions which would not lie against an individual. If a private individual were defendant here,

(a) the plaintiffs' sole remedy would be in foreclosure;

(b) the market value of the property, and not the amount due upon the bonds, would be the limit of recovery;

(c) the lots of the several improvement districts would not be subject to reassessment under state law.

U. S. Code Annotated, Title 28, Judicial Code,, Sec. 41, Sub. 20.

Sioux City & St. P. R. R. Co. v. U. S., 36 Fed. 610.

Smoot's case, 15 Wall. 36, 45.

Gilbert v. United States, 8 Wall. 358, 362; 19 L. ed. 303.

Idaho Comp. Statutes, Secs. 4007, 4017 and 4023.

Bosworth v. Anderson, 47 Ida. 697, 280 Pac. 227.

New First Nat. Bank v. Weiser, 30 Ida. 15, 166 Pac. 213.

Page & Jones on Taxation by Assessment, Sec. 958.
Oklahoma City v. Eastland, 274 Pac. 651.
School Dist. No. 1 *v. City of Helena,* 287 Pac. 164.
Oklahoma City v. Orthwein, 258 Fed. 190.
Idaho Compiled Statutes, Sec. 4141.
Lucas v. City of Nampa (*Idaho*), 37 Ida. 763; 219 Pac. 596.

Section 41, subdivision 20, Title 28 of the Judicial Code (U. S. C. A.) provides in part, that the trial court should have jurisdiction, concurrent with the Court of Claims, of claims

> "upon any contract, express or implied, with the government of the United States * * * in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable * * * ."

Any action which overruns the measure thus determined is at best (as was held in the case of *United States v. Minnesota Mut. Invest. Co., supra,* a contract implied in law and not in fact and not therefore such a contract as is actionable under the provisions of the Tucker Act.

A contract implied in law by legal fiction in the nature of a *quasi*-contract, is not suffcient to confer jurisdiction against the United States under the Tucker Act; the contract must be one "*implied in fact*, founded upon a meeting of minds, which, although not embodied in an express contract, is inferred as a fact, from the conduct of the

parties showing in the light of surrounding circumstances their tacit understanding." *Baltimore & Ohio Railroad Company v. United States,* 261 U. S. 592, 597; see also *Alabama v. United States,* 282 U. S. 502, 505; *United States v. Minnesota Mutual Investment Company,* 271 U. S. 212; *Tempel v. United States,* 248 U. S. 121.

The United States paid to the owners of the property, by purchase or in condemnation proceedings, the full value of the property, which was taken, and paid all taxes and liens of every nature which then existed against said property. Under these circumstances it would be absurb to say that the United States agreed with plaintiffs to pay them a further sum over and above the value of the property which was taken. Such implication is directly negatived by all the facts and the testimony in the case.

In *Ball Engineering Company v. White,* 250 U. S. 46, 57, it is held that no contract can be implied where the government took property with the intent not to pay, and that liability in such case, if any, is in tort, for which the United States has not consented to be sued. See also on this point *Hill v. United States,* 149 U. S. 595; *Tempel v. United States,* 248 U. S. 121, 130; *Journal etc. Company v. United States,* 254 U. S. 581, 585; *United States v. Holland America Lijn,* 254 U. S. 148.

For the sake of argument assume that an improvement district bondholder has an interest in the lots improved, such as is not foreclosed on payment of the assessment

levied upon a particular lot. His remedy against a private individual in ownership of the lot is clear.

Section 4017, Idaho Compiled Statutes, in part, provides:

> "4017. When district bonds are issued under this article for improvements, the cost of which is by law charged by special assessment against specific property, the mayor and council, or trustees, or other authorized officer, board or body, shall levy special assessments each year sufficient to redeem the instalment of such bonds next thereafter maturing, but in computing the amount of special assessments to be levied against each piece of property liable therefor, the interest due on said bonds at the maturity of the next instalment shall be included. *Such assessments shall be made upon the property chargeable for the cost of such improvements, respectively, and shall be levied and collected in the same manner as may be provided by law for the levy and collection of special assessments for such improvements where no bonds are issued, except as otherwise provided by this section.* * * * ." (Italics supplied).

The manner provided by law for the collection of special assessments where bonds are not issued, as referred to in the section of the statute just quoted, is defined by Sec. 4007, Idaho Compiled Statutes, reading:

> "4007. Whenever any expense or cost of work shall have been assessed on any land the amount of

said expenses shall become a lien upon said lands, which shall take precedence of all other liens, *any which may be foreclosed in accordance with the provisions of the Code of Civil Procedure.*

Such suit shall be in the name of the city of . . . . (naming it) as plaintiff, and in any such proceedings where the court trying the same shall be satisfied that the work has been done or material furnished, which, according to the true intent of this article, would be properly chargeable upon the lots or lands through or by which the street, alley or highway improved or repaired may pass, a recovery shall be permitted, or a charge enforced to the extent of the proper proportion of the value of the work or material which would be chargeable on such lot or land notwithstanding any informalities, irregularities or defects in any of the proceedings of such municipal corporation or any of its officers." (Italics supplied).

Section 4023 of Idaho Compiled Statutes, provides in part as follows:

"4023. *Bondholders' rights and remedies.* * * * And if the municipality shall fail, neglect or refuse to pay said bonds or to promptly collect any of such assessments when due, the owner of any such bonds may proceed in his own name *to collect such assessments and foreclose any lien thereon in any court of competent jurisdiction,* and shall recover, in addition to the amount of such bonds and interest there-

on, 5 per centum, together with the costs of such suit including a reasonable sum for attorney's fees.

Any number of the holders of such bonds for any single improvement may join as plaintiff, and any number of holders of the property on which the same are a lien may be joined as defendants in such suit." (Italics supplied).

The Supreme Court of the State of Idaho has left no room for doubt as to the proper construction of the sections quoted by its decision in the comparatively early case of *New First National Bank v. Weiser, supra,* wherein that Court expressly stated in so many words:

"The bondholders must pursue the remedy provided by statute." 30 Ida. 15, 166 Pac. 213.

and in the recent case of *Bosworth v. Anderson, supra,* in which the opinion in part reads as follows:

"This assessment became the basis, as to the individual property owner, of the charge on his land indicative of the benefits accruing to him, and fixed the amount of the lien against his land and it would have to be paid on such unit to redeem his land from the obligation of the bonds. This unit as to the bondholders contained the definition of their security because, while the bonds were obligations secured by all the lands in the district, *in order to enforce their security, foreclosure would be necessary against each particular piece of land in the district*

> *to the amount of liability thereon, theretofore determined by the only body authorized to act, namely, the city council.* Therefore, for the life of the bond issue, these units of assessment were fixed and could not be changed. C. S. Sec. 4017." (Italics supplied). 47 Ida. 697; 280 Pac. 227.

If the sole remedy of a bondholder, as against a private individual in ownership of any of the lots of the improvement district, is foreclosure, as directed by the laws under which such districts are created, any additional remedy of which the plaintiffs seek to avail themselves as against the United States in ownership of the same lots is not within the purview of the Tucker Act and the Court requested to adjudge the remedy is without jurisdiction.

Furthermore, the trial court entered a personal judgment from which private individuals, owners of improvement district lots, are absolved. Even mortgagors of real property under foreclosure are not subject to a personal liability until the security is exhausted, under the laws of the State of Idaho, and the purchaser of mortgaged property is not personally liable unless he agrees to assume such liability. Obviously the holder of an improvement district bond would have no greater right against the owner of a lot in an improvement district than would a mortgagee against a mortgagor, and under the laws of most of the states, including Idaho, a decree of foreclosure of a mortgage is in no sense a personal judgment,

and a personal judgment cannot be entered until after foreclosure sale.

Perkins v. Bundy, 42 Ida. 560, 247 Pac. 571.

If a private individual were defendant as the present owner of any of the lots within the several improvement districts, or if the United States, being the owner, were suable in a court of law, equity or admiralty without its consent as expressed in the Tucker Act, under the most favorable circumstances to the plaintiffs the market value of the several lots minus the aggregate of liens and encumbrances superior to the lien of assessments for costs of improvements would constitute the maximum for which the plaintiffs could make claim. The complaint of the plaintiffs as amended contains no allegation that the property taken by the United States is of a value in excess of all liens of precedence or of equal priority to plaintiffs' alleged liens. The proof is also without any reference to value, except in the testimony of witness Sparks, that "the uninundated portion of District No. 2 (Benevolent Corporation case) would be worthless for residence or business purposes." (page 126). The trial court's finding (Finding 19 in the Benevolent case) finds "that the property so taken by flooding, as aforesaid, by the defendant, was, at the time of taking, of a value greatly in excess of the claim of the plaintiff." (pages 71-72), but the finding is wholly without support. T. C. Sparks is the only witness who displayed any qualifications as a witness as to values or gave any testimony as to values, and the whole of such testimony is as follows:

> "* * * I have been an abstractor for sixteen years in American Falls and while not engaged in the general real estate business, I have handled property for non-residents on some occasions; I have become acquainted with the value and location of various properties in American Falls and in my opinion the uninundated portion of district No. 2 would be worthless for residence or business purposes." (Tr., page 126).

The trial court having thus lacked jurisdiction to hear the cause under the pleadings and to determine the action favorably to the plaintiffs if the action were against an individual without any proof of the value of the property involved, the Tucker Act does not enlarge the court's jurisdiction in actions against the United States.

In another particular there is disclosed a total lack of jurisdiction in the trial court. The plaintiffs' complaints as amended (paragraphs 17, 18, 19, pp. 26-29), the proof (page 109), and the court's findings (finding 22 page 74) conclusively establish the fact that the original assessment against the lots of the several improvement districts has been fully paid. Thus Finding No. 22 reads as follows:

> "22. That prior to the taking of the property and use as a part of the American Falls reservoir and prior to the flooding thereof, the defendant did not pay or cause to be paid all the liens against said improvement districts, but only paid the amount shown

upon the original assessment, and at the time of the paying of the amount shown on the original assessment the defendant was aware that said original assessment through mistake and inadvertence was not sufficient to pay the bonds issued by said Districts 1, 2 and 8 as the same became due and payable in accordance with their terms."

Judgment having been given on the theory, that acquiring the lots of the several districts removed them from the power of reassessment and destroyed the remedy of reassessment alleged to have otherwise been available to the plaintiffs, if the remedy of reassessment was unavailable to the plaintiffs against the lots in ownership of private individuals, it necessarily follows that the plaintiffs are not deprived of a remedy by officers of the United States, no contract with the United States is implied, and the trial court lacked jurisdiction.

Section 4141, Idaho Compiled Statutes, provides:

"4141. In all cases of special assessments in local sewerage improvements or sewerage disposal works of any kind against any property, person or corporation whatsoever, where any such assessments have failed to be valid in whole or in part for want of form, or of sufficient informality or irregularity, or nonconformance with the charter, ordinances or provisions of law governing such assessments, the city council or trustees, or other authorized bodies or board shall be, and they are hereby authorized to re-

assess such special taxes or assessments and to enforce their collection in accordance with the provisions of law existing at the time the reassessment was made.

Whenever, for any cause, mistake or inadvertence, *the amount assessed shall not be sufficient to pay the costs of sewerage improvement made and enjoined on the property,* or on the owners of property in the local assessment district where the same is made, it shall be lawful and the city council or trustees or other authorized body or board is hereby directed and authorized to make reassessment upon all the property in said local assessment district to pay for such improvements, such reassessment to be made and collected in accordance with the provisions of law or ordinances existing at the time of the levy." (Italics supplied).

There is no allegation in the complaints, nor is there evidence or findings, to show the cost of the improvements, and no attempt has been made to show that the original assessment was not sufficient to pay the actual cost of such work. Proof and pleadings are also lacking of any circumstances designated by the statute as will bring the same into operation. The section quoted has been construed by the Idaho Supreme Court in the case of *Lucas v. City of Nampa, supra,* in which the opinion is in part quoted as follows:

"It is true that C. S. section 4141, provides that in cases of special assessments in local sewerage im-

provements, where any such assessments have failed to be valid for want of form, or of sufficient formality or regularity, or conformance with the chapter, ordinances, or provisions of law governing such assessments, the city is authorized to reassess such special taxes and enforce their collection in accordance with the provisions of law existing at the time such reassessment is made. It is clear, however, that the reassessment attempted to be made in the instant case was not made for any reason assigned in the statute, nor was it made in conformity therewith, but, on the contrary, the city authorities found that, after paying a 10 per cent commission for the sale of the bonds, the employment of the city engineer upon a basis of 5 per cent of the cost of the project, and incurring the other expenses in the construction of the works, the cost of the completed system with these additional expenditures would approximate $160,000 instead of the $118,300 contained in the estimate of the city engineer in the original ordinance of intention."

Lucas v. City of Nampa, 37 Ida. 763; 219 Pac. 596.

Attention is again directed to the finding of the Court quoted above

"that the defendant was aware that said original assessment through mistake and inadvertence was not sufficient *to pay the bonds* issued by the district * * *"

a contention identical in principle, and unavailing in the case of *Lucas v. City of Nampa,* as shown by a portion of the opinion quoted.

Action Barred by State Statute of Limitations

On Demurrer—not jurisdictional
Assignments of Error 2, (page 161)
and 16 (page 166)

The United States is entitled to the benefit of the State Statute of Limitations.

Stanley v. Schwalby, 147 U. S. 508.

The bar of the State Statute of Limitations was raised and pleaded as the Defendant's sixth defense (Answer to second amended petition, page 57).

Any cause of action which the plaintiffs may have had is barred.

Sections 6596, 6597, 6607, 6609, 6611 and 6617, Idaho Compiled Statute.

Section 6611, read in connection with Section 6607, is as follows:

"6607. The periods prescribed for the commencement of actions other than for the recovery of real property are as follows:

6611. Within three years:

1. An action upon a liability created by statute, other than a penalty or forfeiture.

Obviously, this is not an action for recovery of real property but is either an action based upon a liability created by statute (for the lien on this property claimed by the plaintiff, if any exists, was a lien created by statute) or it is an action based upon an alleged trespass upon real property, for it is alleged in the amended petition in the one case and in the second amended petition in the other that

> "on or about the first day of January, 1927, the defendant * * * took absolute, permanent and exclusive possession, title and control of all * * * the real property within said Local Improvement District * * * *for a public use and purpose, to-wit, for a reclamation reservoir, which reservoir is commonly known as the American Falls reservoir, and sold, destroyed or removed all improvements located upon the lots and parcels of land within said * * * improvement districts and inundated and permanently flooded the land embraced within said * * * improvement districts."
>
> (pages 28-29)

Notwithstanding the undisputed evidence—

(a) that the United States purchased the lots of the several improvement districts by separate lot purchase transactions from 1920 to 1926 inclusive (pages 131-134);

(b) that the United States took possession of the several lots as payment was made therefor (page 124, defendant's exhibit 1, page 144);

(c) that all of the buildings upon the lots were removed between April, 1925, when witness Sparks moved his house off, and the winter of 1925 or spring of 1926 (page 123);

(d) that the dam was completed in 1926 and some water stored behind the same in the winter of 1925-1926, and the same filled to capacity in the winter of 1926-1927 (page 131);

The Court found as a fact: that the former record owner thereof (lots of improvement districts) retained the right of possession until January 1, 1927, and that the property was taken for a public purpose and flooded shortly after January 1, 1927 (page 76, finding 25) and concluded that the statute of limitations began to run on that date (January 1, 1927). (Conclusion 3, page 77).

Case 743 was commenced in July 1930 (case 743, p. 57), later than 3 years from the accrual of the action under the trial court's theory. It seems obvious that when the United States acquired the first lot in 1920 for reservoir flowage purposes, ownership thereof was assumed, and exclusive dominion thereover exercised, and had the plaintiffs any lien, their right of action immediately accrued. But if plaintiffs were obliged to wait until there has been an actual physical destruction of the property upon which they claimed their right of lien, what peculiar virtue has the destruction by flooding, that the actual tearing down and moving away of property does not have to accrue their right of action and start the run-

ning of the statute of limitations? Witness Sparks testified that he moved his house off of the reservoir site in April 1925 and that all the other buildings in the site were moved between that time and the winter of 1925 or early spring of 1926.

Not only were the plaintiffs' allegations and proof insufficient to show jurisdiction of the trial court to hear and determine the cases, but it also appears affirmatively that the actions are barred under the provisions of the state statutes of limitations.

The plaintiff's complaint as amended failed to state a cause of action in several other particulars which were called to the attention of the trial court by demurrer to the original and amended complaints.

(Assignments of Error Nos. 1-2, p. 161; Deft. Demurrer 31-38)

As has already been pointed out (page 45 hereof) the plaintiffs' causes are dependent upon Section 4141, Idaho Compiled Statutes, providing in substance that whenever through mistake or inadvertence the amount originally assessed shall not be sufficient to pay the *costs of the improvement,* a reassessment under certain circumstances may be had, while the allegations of their complaint wholly fail to bring the purported reassessment in 1928 within the purview of the statute.

Neither the allegations of the complaint nor the findings of the Court support any right of reassessment, for it

is only alleged and found that the original assessment was insufficient to pay *the principal and interest on the bonds*, while the statute authorizes reassessment only when the original assessment *"is insufficient to pay the cost of the improvement."* The cost of the improvement is a different thing altogether from the principal and interest on the bonds.

Paragraph 17 of the second amended complaint in the Benevolent Corporation case (page 26) alleges in part as follows:

> "17. That under date of July 3rd, 1928, and while the above described bonds, so owned and held by the plaintiff herein, and which are involved in this action, and the interest on said bonds, were due, owing and unpaid, on account of the mistake or inadvertence of the board making the original levy and assessment of benefits *having failed to levy an amount sufficient to pay the principal and interest on said bonds as the same become due*, and in order to comply with its statutory duty in the premises, the City of American Falls (formerly the Village of American Falls), regularly enacted its ordinances Nos. 122, 123, and 124, which were ordinances providing for a reassessment of benefits upon all taxable property in said districts 1, 2, and 8 respectively, * * * (Italics supplied).

One pleading a statute and asking its benefits must surely bring himself within its terms. The Supreme

Court of the State of Idaho has in *Lucas v. City of Nampa, supra,* held that a deficit upon original assessment *to pay the costs of the improvement* is essential to bring into operation the section of the statute relied upon.

The complaints as amended also fail to allege another essential to state a cause of action, namely, the ownership of the claim in the plaintiffs at the time the same accrued.

Roberts v. Nor. Pac. Ry., 158 U. S. 1.

Brothers v. United States, 250 U. S. 88.

U. S. Revised Statutes, Sec. 3477.

U. S. Compiled Statutes, 1918, Sec. 6383.

Paragraph 7 of the plaintiff's second amended complaint in the Benevolent Corporation case alleges in part as to the ownership of the bonds upon which the actions are based, as follows:

> "and that thereafter (the issuance of the improvement district bonds by American Falls, and their purchase by one John K. Mullen) * * * said John K. Mullen sold, transferred and set over to the plaintiff * * * the bonds aforesaid." (Page 16).

The damage to the holder of the bonds is alleged to have occurred not later than January 1. 1927. It was necessary for the complaint as amended to show that the plaintiffs were the owners of the bonds at the time the injury thereto occurred. A transfer of the bonds after the injury complained of does not include the claim for damages, the presumption being that the purchaser of damaged property pays only the depreciated value thereof.

This rule is clearly announced in the opinion of the U. S. Supreme Court in *Roberts v. Northern Pacific R. R. Co., supra,* reading:

> "It is well settled that where a railroad company, having the power of eminent domain, has entered into actual possession of land necessary for its corporate purposes, whether with or without the consent of the owner of such lands, a subsequent vendee of the latter takes the land subject to the burthen of the railroad, and the right to payment from the railroad company, if it entered by virtue of an agreement to pay, or to damages, if the entry was unauthorized, belongs to the owner at the time the railroad company took possession."
> 158 U. S. 1.

The rule is especially applicable to claims against the United States under the prohibition by Rev. Stat. 3477 against the assignment of such claims. The federal statute cited is given construction by the U. S. Supreme Court in the case of Brothers v. United States, *supra.*

The complaint as amended charges the defendant with having, in the exercise of powers of eminent domain, acquired the lots in the several improvement districts in a lawful manner; also that the assessments, made against the lots for payment of the bonds claimed by plaintiffs, are liens. The liens of State and County taxes take precedence over liens of improvement district assessments, and the failure of plaintiffs to allege that the lots of the

improvement districts were not acquired by the United States at tax sale for delinquent state and county taxes make their complaints as amended deficient to state causes of action.

Sec. 3097, Idaho Compiled Statutes.

Bosworth v. Anderson, 47 Ida. 697; 280 Pac. 227.

Section 3097, above cited, provides that all property subject to taxation shall be subject to a lien for state and included municipal taxes, "and shall only be discharged by payment, cancellation or rebate * * *."

Upon a clash of interest between special improvement district bondholders and local municipalities as to the precedence of the respective liens of improvement district assessments and general State and County taxes, the Idaho Supreme Court in *Bosworth v. Anderson, supra*, held:

> "The decree of the trial court holding state, county and city taxes superior to special improvement assessments, and denying the claim of the bondholders against the county for a share in the proceeds of the sale of the various pieces of property sold by the county for state, county, and city taxes, and denying appellant's claim against the city for amounts collected by the city as principal and paid as interest, is sustained."
>
> 47 Ida. 697, 280 Pac. 227, 230.

The complaints as amended fail to state a cause of action also in that they do not show that the plaintiffs own

all of the outstanding interest in the bonds of the several improvement districts.

The complaints as amended allege the issuance of all bonds of the districts (pages 15, 22 and 25) and that the plaintiffs purchased less than all of those issued and sold. The market value of the lots must be the maximum which the United States would be required to pay in any event; therefore, the complaints which failed to allege the ownership of all bonds in the plaintiffs fail to state a cause of action.

Error on Motions to Strike and Make More Definite and Certain.

(Assignments of error No. 3, page 161)

The amended complaint asks that the United States pay interest upon the bonds claimed by the plaintiffs to the extent that the whole amount of principal and interest has not been paid by the city of American Falls. Thus in paragraph 20 of the amended complaint in the Benevolent Corporation case, it is alleged that the United States is indebted to the plaintiff for interest (page 30). The same is true of paragraph 10 of the amended complaint in the Investment Company case (No. 743, page 23). The trial court not only permitted the objectionable portions of the complaint to stand, but actually allowed the plaintiffs' interest (pages 78 and Pl. Ex. 14, page 144) against the United States. In this we think the Court was in error.

Boston Sand & Gravel Co. v. United States,
278 U. S. 41-55.

ON THE MERITS

(Assignments of Error 5, 7, 8, 10, 11, 16, 17, 18, 19)

At the trial the plaintiffs offered the bonds in question, and in proof of their ownership the trial court first denied and later received the hearsay testimony of one Chester Greene, who testified that he had never been an officer of either of the plaintiff corporations and that all he knew about the ownership of the bonds was what one J. K. Mullen told him on the occasion of his (J. K. Mullen's) delivery of said bonds to witness and Mr. Bissell for collection in 1928 (pages 82-98).

Timely and insistent objection was made to the testimony of this witness (pages 82, 84, 86, 87, 88, 89, 92, 93, 97, 98). The trial court alternated in sustaining and overruling counsel's objections to this testimony but apparently the same was accepted as competent proof for the court found upon the testimony of this witness alone, that the plaintiffs were the owners of the bonds (Finding 7, pages 62-63). The adverse rulings of the court upon the admission of this testimony and the findings of the court based thereupon are assigned as error (assignments 22 (a) to (d) inclusive).

Accepting the hearsay testimony of witness Greene as to ownership of bonds in the plaintiffs, there was no testimony, hearsay or otherwise, that the plaintiffs owned the bonds at the time the alleged cause of action thereupon accrued. All that Chester Greene knew about the bonds was that he saw them delivered to witness and Mr. Bissell

in 1928 by a J. K. Mullen (not an officer or stockholder of nor shown to be in anywise interested in the plaintiff corporations), who said, at the time, that bonds numbered

21 to 24 of district No. 1,

12 to 15 of district No. 2,

28 to 43 of district No. 8, (Pl. Ex. 1 to 3 inc.)

were for the plaintiff Benevolent Corporation, and that bonds 38 to 51 of District No. 9 (Pl. Ex. 4) were for the plaintiff Investment Co. (pages 141, 142). The only possible presumption of ownership that might be inferred from this testimony was that the bonds belonged to J. K. Mullen. There could be no presumption in any event that the plaintiffs became the owners of the bonds before they were thus delivered. Witness Greene also testified (from hearsay) that the plaintiff Benevolent Corporation was not organized until 1925 (page 96).

If any cause of action accrued upon the bonds, it accrued when the United States acquired title to the lots alleged to have been impressed with some kind of an interest in the improvement district bondholders, and under the rule of *Brothers v. United States, supra,* and the specific prohibition against the assignment of claims against the United States the plaintiffs' proof as well as their pleadings have failed, and upon the refusal of the Court to so hold, the appellant has assigned error (Assignments of error: No. 2, page 161; No. 7, page 163, No. 8, page 163, No. 10, page 164, and No. 11, page 164).

There was no proof that the owners of the bonds in question had any interest in the lots of the several im-

provement districts at the time the United States acquired title.

Secs. 4146, 4147, 4148, 4133, Idaho Compiled Stats.

Bosworth v. Anderson, 47 Idaho 697; 280 Pac. 227.

Heine v. Commissioners, 19 Wall. 655.

Lyon v. Alley, 130 U. S. 177.

United States v. City of Buffalo, 54 Fed. (2) 471.

United States v. Pierce County, 193 Fed. 529.

Bannon v. Burnes, 39 Fed. 892.

Section 4146, Idaho Compiled Statutes, provides in part as follows:

"4146. *Redemption by owner from assessment.* The owner of any lot or parcel of land charged with any such assessments may redeem the same from all liability for such assessment by paying the entire assessment charged against such lot or parcel of land, without interest, within 30 days after notice to him of such assessment, which notice shall be given as follows:"

Section 4147 provides:

"4147. *Same: After bonds issued.* The owner of any such lot or parcel of land may redeem the same from all liability for said assessment at any time after said 30 days by paying all the instalments of said assessment remaining unpaid and charged

against such property at the time of such payment, with interest thereon at the rate of not to exceed 8 per cent per annum from the date of issuance to the time of maturity of the last instalment."

Section 4148 reads in part as follows:

"4148. *Same: Effect of redemption.* * * * Where any piece of property has been redeemed from liability of the costs for any improvements as herein provided, such property shall not thereafter be liable for further assessment for the costs of such improvement except as hereinafter provided."

Section 4141, I. C. S., is the only section of the statutes to which the last quoted section could have any possible reference, and this section in part provides as follows:

"4141. *Reassessment.* * * * Whenever, for any cause, mistake or inadvertence, the amount assessed shall not be sufficient to pay the costs of sewerage improvement made and enjoined on the property, or on the owners of property in the local assessment district where the same is made, it shall be lawful and the city council or trustees or other authorized body or board is hereby directed and authorized to make reassessment upon all the property in said local assessment district to pay for such improvements, such reassessment to be made and collected in accordance with the provisions of law or ordinances existing at the time of the levy."

Aside from the statute making the assessments levied for the payment of the improvement, the only lien upon the lots of the improvement district, there are numerous reasons for the rule that the assessment and not the bond is the lien upon the property, principal among which is that the bond is issued, sold and transferred without notice to the lot owner, while the assessment cannot be constitutionally made without such notice and an opportunity to be heard upon the justice of the same.

The bondholder looks to the assessment as the measure of his security, and the lot owner, as the limit of his liability.

Bosworth v. Anderson (*supra*).

The bondholders claim of implied contract is of necessity based upon a claim of lien upon the lots at the time they were acquired by the United States. The original assessment was paid in full at the time of the government's purchase (Testimony of Willard S. Bowen, page 109; Finding 22, page 74). At that time the bondholders, whose identity was unknown to officers of the government, had at best a right to have the lots reassessed.

> "It is said in argument that plaintiffs have a lien upon the taxable property of the district for the payment of these bonds, and that equity always enforces liens where no other mode of enforcing them exists. Whether this be true doctrine of a court of equity to the full extent here claimed, we need not decide. Nor need we decide whether taxes once lawfully levied

> are, until paid, a lien on the property against which they are assessed, though it is laid down in the very careful work of Judge Dillon, that taxes are not liens upon the property against which they are assessed, unless made so by this charter, or unless the corporation is authorized by the Legislature to declare them to be liens. 2 Dil. Corp., 659. But here no taxes have been assessed except those which have been released by the bond holders accepting new bonds for the interest of the year so assessed. And it is too clear for argument that taxes not assessed are not liens, and that the obligation to assess taxes is not a lien on the property on which they ought to be assessed. This was one of the points urged and overruled in the case of Rees v. Watertown."
>
> *Heine v. Commissioners,* 19 Wall. 659.

The testimony of Willard S. Bowen, accountant, who prepared and submitted several reports upon audit of the improvement district bond funds of the city, did not give any support to the proposition that the bonds in question were liens. The reports of the audits were admitted over objection that the same were immaterial, the pleadings having admitted that the original assessment had been paid in full (pages 100, 102, 104) and the rulings of the Court are assigned as error (assignments of error 23 (a) to (e) inclusive).

Witness Bowen's testimony was—

That the original assessments have proven insufficient

to pay the principal and interest of the bonds in full (page 104) due principally to the "unexpected continuation" of interest payments on the bonds, which in turn he testified was due

(a) to loss of bond funds in failure of depository of the city (pages 110, 112).

(b) to unexplained dissipation of bond funds of districts Nos. 8 and 9 (pages 115, 116).

(c) to failure of city when issuing bonds to time their maturity dates with collection time of assessments (pages 111-112).

(d) to failure of city when issuing bonds to issue them in smaller denomination (page 109).

(e) to delay in making principal payments with bond funds on hand by the city (pages 110-111).

These losses and delays absorbed funds intended for principal and interest payments. This is summarized in witness Bowen's report of December 18, 1926 (Plaintiffs' Exhibit 9, page 143) as follows:

"You will note from Schedule 'C-1' to 'C-4' inclusive, that in all of the special improvement funds, a far greater amount of interest was paid out than was estimated to be necessary originally. The following comparison will furnish a concise analysis of this:

	Total	Sewer Dist. Number 1	Sewer Dist. Number 2	SW. Dist. Number 8	SW. Dist. Number 9
Bond Interest Paid	$38,359.52	$11,865.00	$3,535.00	$9,959.32	$13,000.20
Amount Originally Estimated	24,150.72	7,360.83	2,251.48	6,789.53	7,748.88
Excess over Estimate	$14,208.80	$ 4,504.17	$1,283.52	$3,169.79	$ 5,251.32
By then deducting from this excess interest paid the amount of excess receipts over and above the amount of the original set-up (as given in the third section of Schedule 'E' amount to	$ 3,641.34	$ 1,871.44	$ 186.91	$ 897.22	$ 685.77
This gives us an amount which roughly approximates the present deficiency in the various funds as shown in the last section of Schedule 'E'	$10,567.46	$ 2,632.73	$1,096.61	$2,272.57	$ 4,565.55

This definitely proves that it was the *unexpected continuation* of interest payments on bonds that was most largely responsible for the present deficiency in these special funds."

(Witness Bowen's Report, Pl. Ex. 9, page 143)

The testimony of witness Bowen established the defendant's first defense to the action, namely, that the city which is the collection agency of the bondholders was responsible for any failure of payment of bonds.

After the bank, in which improvement district bond funds were on deposit, had failed in February, 1923, witness Bowen was called upon to audit the several funds mentioned which he did and reported on April 17, 1923, as follows:

"I present herewith a report showing the results of a special audit of the available records covering transactions in Local Sewerage Improvement Districts Numbers One and Two, and Local Sidewalk Improvement Districts Numbers Eight and Nine, which I trust will solve the problem with which you have presented me, namely: 'Why is the City of American Falls so far behind with the payments of Bonds issued for the use of the Districts above enumerated?'

I wish to say, gentlemen, that I have spent exactly as much time in attempting to gather together records and papers from which to compile the within statements as it has taken to compile the statements.

The Books of the City are lacking in a great many particulars, the most outstanding one being that no Cash-Book or Ledger has been kept, in which to record the financial transactions of the city. This has made my work rather uncertain, as I have been compelled to gather most of the data for this report from the Books of Power County, and from the Records of the First National Bank of this city. In the earlier portion of the period covered by my audit, the County records with respect to some transactions are quite meager, which has only added to the difficulty of the work. Many Bank statements, together with the accompanying cancelled vouchers or warrants are missing entirely, and while recourse to the Bank's records gives the amount of the transactions, yet it furnished no vouchers to support such transactions, thereby losing the greater part of the value of the information. The statements contained in this audit are presumed to be correct only to the extent of the validity and correctness of the records from which they were compiled.

Accordingly to the best available data, the failure of the bonds to be paid according to the degree originally planned is due to the following reasons, more fully explained in the pages referred to opposite each item:

Special District Funds used for purposes other than those for which they were assessed and paid (as per tabulation

on page 2)	$4,338.48
Excess interest paid on account of the bonds not being paid as originally planned, the interest of course, continuing until the bonds were paid (as per tabulations on page 3)	6,556.15
Delinquent taxes yet due on Special Districts (as per tabulations on page 3	8,428.43
Taxes unpaid on account of the property on which same have been assessed deeded to County for taxes due, the County being Trustee for, and being responsible to the City for same whenever paid (as per tabulations on page 3)	1,151.93
Failure to assess proper amount to retire principal on bonds of Sewer District No. 1	355.19
These differences aggregate	$20,830.18"

(Pl. Ex. 8, page 143 of transcript).

The first item in the above summary was explained in a later report (plaintiff's Exhibit 9) but the excess interest item was not explained, except for the reasons given which we have hereinbefore, on page 64 summarized. This showing of dissipation of funds collected for payment of the bonds is superfluous to the application of the principle that the right to assessment is not a lien

upon property in contemplation of assessment. It goes further and shows conclusively that under a statute which authorizes a city council or board of trustees to make a reassessment,

> "Whenever for any cause, mistake or inadvertence the amount assessed shall not be sufficient to pay the *costs of sewerage improvement* made and enjoined on the property or on the owners of property in the local assessment district where the same is made, * * *" (Sec. 4141, I. C. S.),

the bondholders have never had a right to have the lots of the several improvement districts reassessed. The allegations of the complaint and the findings of the court merely set out that the original assessment was insufficient *"to pay the principal and interest on the bonds"* which is a different thing altogether from the *"cost of the improvement"* especially where the interest was increased by delays in payment of principal resulting from the bank failure and other causes, and the judgment fund recovered from the sidewalk contractor is shown to have been misapplied to other purposes.

One of the losses to principal of the bond fund was testified to by witness Bowen as the unexplained misappropriation and wasting of a fund of $2916.53 paid to the city by an improvement district contractor upon a judgment. His payment was made on January 3, 1917. For no apparent reason the trial court sustained an objection to the testimony with respect to this fund as the

same pertained to districts Nos. 1, 2 and 8 involved in the Benevolent Corporation case.

"Mr. Bissell: I object to the introduction of any evidence concerning the recovery of judgment against Sam Forter as far as Districts 1, 2 and 8 are concerned, that being a cause of action for defective construction of sidewalks, in District No. 9.

That is not material here.

The Court: Objection sustained, but not as to No. 9.

A. Sam Forter was a contractor who constructed all, or part at least, of the sidewalks in District No. 9." (Page 113).

Witness Bowen's report (Pl. Ex. 9) refers to this judgment as a credit to the two sidewalk improvement districts, Nos. 8 and 9. His report reads in part:

"It also appears that a judgment was taken against Sam Forter which was in connection with sidewalk districts 8 and 9, and which resulted in the receipt by the city on Jan. 3, 1917 of $2916.53."

It will be remembered that the bonds of Sidewalk Improvement District 8 are involved in the Benevolent Corporation case and those of District No. 9 in the Investment Company case.

This ruling of the Court is assigned as error (Assignment of Error 23 (i), page 184).

Proof at the trial does not establish such indispensable elements of plaintiffs' cases as

(a) ownership of any bonds in plaintiffs;

(b) ownership of bonds at the time any right of action thereupon accrued;

(c) that the original assessments having been paid in full and no reassessment made at the time the United States acquired title, the improvement district bonds are, in themselves, an interest in the lots of the districts;

(d) that a reassessment is authorized under the laws of Idaho;

(e) that in view of the fact that the extent of recovery in any event is the value of the property taken, there was no proof that the property acquired by the United States had any value whatsoever;

(f) that the officers of the United States in acquiring title recognized the purported interest of the plaintiffs in the property being acquired.

On the contrary, the proof establishes the defenses of the defendant

(1) that improvement district bonds were not liens upon the property acquired by the United States;

(2) that the loss to the bondholders was due to action of the city of American Falls, and the same was greatly reduced by action of the United States in purchasing the lots of the improvement districts resulting in payment of delinqent improvement district assessments including interest and penalties;

(3) that the city had made no reassessment when the government's title was acquired and had no right at any time to make a reassessment; and

(4) that any rights of action which the plaintiffs may have had were barred by the statute of limitations of the State of Idaho.

ERRORS IN FINDINGS OF FACT

(Assignment of Errors 4, 6, 8, 9, 10, 12, 13, 14, 15, 20, 21, pages 161 to 170 inclusive).

The court made findings of fact and conclusions of law n which errors were by the defendant pointed out in a notion to correct, which the court denied. Error is assigned to the objectionable findings and to the ruling of he court upon the motion to correct findings (Assignment of Error 26, page 189).

While the numbering of the objectionable findings in he two cases is different, the same are practically identical.

The objections to the several findings are obvious from the findings themselves as pointed out in the appellant's motion to correct the findings, and in the assignments of error, and failure to explicitly mention in this brief is not intended as a waiver thereof. Objections to the rulings of the court upon the admissability of evidence, as pointed out in assignments of error (Nos. 22 to 25 inclusive, pages 171-188) and which may not have been expressly commented upon in this brief, are also expressly saved.

To summarize the numerous objections to rulings of the trial court

1. The court improperly assumed jurisdiction because the actions alleged and as shown by the testimony

   A. are not upon implied contract;

   B. were not commenced within the 6-year period fixed by the Tucker Act for the commencement of such actions, and

   C. The action of the United States in acquiring the property was beneficial to rather than detrimental to the bondholders and in any event any injury would be too remote and consequential.

II. Upon the pleadings, it is shown

   A. that the actions of the plaintiffs are barred by the Idaho statute of limitations;

   B. that by alleging payment in full of the original

assessment, the plaintiffs negative any right of action because reassessments contemplated but not yet made are not liens upon property proposed to be thus reassessed;

C. if the right to reassess is a lien, the complaints, which allege the original assessments paid are insufficient to pay the principal or interest of improvement district bonds, do not allege a right to have such reassessments made and, therefore, fail to state a cause of action.

D. That the time of assignment of the bonds to the plaintiffs, not being shown, there is no cause of action in the plaintiffs if the action accrued prior to the assignment.

E. that the complaints, which fail to allege that the plaintiffs are the owners of all outstanding improvement district bonds of an aggregate obligation of no more than the value of the lots in the several improvement districts, fail to state a cause of action.

III. That those portions of the complaints charging he United States with interest should have been stricken.

IV. On the merits—

A. upon the testimony and exhibits offered, the trial court should have dismissed the actions for jurisdictional grounds summarized in "I" above;

B. non-suit should have been granted because of failure of proof—

(1) to show any interest of the plaintiffs in the bonds in suit;

(2) to show ownership of the bonds when the plaintiffs cause of action accrued;

(3) to show that the bonds represent any interest in the lots of the several improvement districts;

(4) to show any right of reassessment in the city of American Falls for the benefit of the bondholders;

(5) the proof shows the bondholders loss, if any, was due to acts of the city of American Falls, and was mitigated by action of the United States in acqniring the lots of the improvement districts.

V. The findings are not supported by the evidence and are contrary to the evidence in that

A. There is no evidence to support the finding that the value of the lots acquired by the United States is or was at any time in excess of the amount due upon improvement district bonds.

B. There is no evidence to support the finding that the plaintiff owned the bonds or that the same were ever transferred from J. K. Mullen.

C. Evidence that the United States acquired title to the lots of the several improvement districts between 1920 and 1926 and that T. C. Sparks removed his house in April 1925 from his lot upon its sale to the United States, is contrary to the finding that the United States took possession, title and control of the property on January 1, 1927, or removed or destroyed the improvements thereon;

D. The court should have corrected his findings as requested to do so by the defendant's motion for that purpose.

VI. The court erred in ruling upon the admissibility f evidence as assigned in assignments Nos. 22-25 inusive.

Circumstances similar to those shown by the record n the two cases at bar must have impelled the author of ne opinion of the Supreme Court of the United States n the Smoot case (*supra*) to say

"There is, in a large class of cases coming before us from the Court of Claims, a constant and ever recurring attempt to apply to contracts made by the Government, and to give to its action under such contracts, a construction and an effect quite different from those which courts of justice are accustomed to apply to contracts between individuals. There arises, in the mind of parties and counsel interested for the individual, against the United States

> a sense of the power and resources of this great Government, prompting appeals to its magnanimity and generosity, to abstract ideas of equity, coloring even the closest legal argument. These are addressed in vain to this Court. Their proper theater is the halls of Congress, for that branch of the government has limited the jurisdiction of the Court of Claims to cases arising out of contracts express or implied—contracts to which the United States is a party in the same sense in which an individual might be, and to which the ordinary principles of contracts must and should apply."
>
> 82 U. S. 36 at 45.

In the Smoot case there was an express contract. Here the contract is at best a strained fiction implied at law, to sustain which, it was necessary for the trial court to go beyond its jurisdiction upon an ordinary suit, and to hold that the plaintiffs are entitled to recover against the United States for such acts as an individual would not be amenable, as established by a construction of local laws and an application of rules of evidence at wide variance with such laws and rules as they are construed and applied in suits against an individual. The trial court instead of limiting its jurisdiction in suits against the United States to claims upon contracts in respect to which the plaintiffs would be entitled to redress against the United States either in a court of law, equity or admiral-

y if the United States were suable, has greatly expanded t, notwithstanding the express provisions of the Tucker Act to the contrary.

The plaintiffs complaints as amended should be dismissed.

Respectfully submitted,

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Service of the within and foregoing Brief of Appellant by receipt of copy is hereby acknowledged this..... day of....., 1932.

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Attorney for Respondents